

ALEX TING KUANG KUO

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v.

CREDIT CORPORATION (M) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR

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HAMID SULTAN ABU BACKER J

[SUIT NO: D-22-231-2001]

25 OCTOBER 2012

CIVIL PROCEDURE: *Costs - Getting-up fee - Solicitor and client - Senior Assistant Registrar awarded sum of RM100,000 - Whether excessive - Application to review award - Factors to consider - Whether solicitor-client costs is based on indemnity basis - Whether court slow in disturbing award granted - Rules of the High Court 1980, O. 59 r. 28 - Rules of Court 2012, O. 59 r. 16(1), (2) & (4)*

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This was an application by the defendant ('bank') to review the getting-up fees awarded by the Senior Assistant Registrar ('SAR') for bill of costs on solicitor-client costs. The former solicitors for the bank in the instant case, *ie*, Messrs Lee & Lim ('respondent'), had sent its bill for the sum of RM42,350 to the bank. Dissatisfied with the quantum claimed, the bank filed a petition under the Legal Profession Act 1976 for the respondents' bill to be taxed. Based on the bill of costs filed, the SAR allowed RM35,000 for getting-up fees. However, upon filing a review on this sum, the SAR revised her decision and awarded the getting-up fees in the sum of RM100,000. The bank's application herein was in relation to its dissatisfaction as to the revised sum granted by the SAR alleging that the award was defective and was founded on errors of law. On the contrary, the respondent contended that the judge had no jurisdiction to interfere unless it could be demonstrated that the taxing registrar had erred on a question of principle.

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Held (getting-up fees fixed at RM35,000):

(1) Under the Rules of the High Court 1980, taxation of costs on party to party basis was dealt in O. 59 r. 27 and solicitors and own client basis in O. 59 r. 28. Similar provisions for assessment are provided for in O. 59 r. 16(3) and r. 16(4) Rules of Court 2012 ('RC 2012') respectively. What these Orders do not mention is the methodology for deriving at the

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- A getting-up fees. Deriving at the getting-up fees is a challenging task for taxing registrar in almost all jurisdiction and it is best to be dealt with by the judge who hears the matter and that is what precisely the RC 2012 has mandated in contrast to other jurisdiction to arrest the cumbersome process of taxation and review. (para 13)
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- C (2) Order 59 r. 16(1) RC 2012 gives some guidelines as to what relevant circumstances the court must take into consideration when assessing costs. The court may look into other factors such as the conduct of the parties, before as well as during proceedings, and efforts made to resolve the dispute to order no costs or reduced costs or order party to party costs on indemnity basis, *ie*, sometimes referred to as solicitor-client costs. This is specifically set out in O. 59 r. 16(2) RC 2012. (para 8)
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- E (3) As a general rule, the court is obliged to order party to party costs on a standard basis and is given the discretion to order the same on indemnity basis. A party to party costs on indemnity basis may be ordered when there has been scandalous conduct and is meant to be punitive in nature. Order 59 r. 16(4) RC 2012 sets out the manner by which costs on indemnity basis should be assessed. (para 10)
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- G (4) Solicitor-client costs are based on indemnity basis. The said costs are not based on what costs or fees the solicitor has agreed with the client. If the solicitor had agreed with the client on a certain fees (actual costs), they are contractual and have nothing to do with taxation on solicitor-client basis. The taxing registrar must note this distinction. Even if there is a contract between the parties to assess costs on solicitor-client basis, the ultimate discretion of costs is still vested in the court pursuant to the Courts of Judicature Act 1964 as well as the RC 2012 to award an appropriate amount. (para 11)
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- I (5) Having ascertained the approximate party to party costs relating to the getting-up fees, this court took the view that the getting-up fees herein should not exceed RM35,000, *ie*, the sum awarded by the SAR in the first instance, which by itself was excessive. However, the High Court judge should be slow in disturbing the same even though the decision of the registrar can be set aside by the judge and in appropriate cases even if there is no appeal or review. (paras 13 & 14)

Case(s) referred to:

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC (**refd**)

Canopee Investment Pte Ltd & Ors v. Landmarks Holdings Bhd & Ors [1990] 1 CLJ 466; [1990] 1 CLJ (Rep) 699 HC (**refd**)

EMI Records v Wallace [1982] 2 All ER 980 (**refd**)

Goh Heng Loo v. Gensource Berhad & Hong Leong Bank Berhad (Suit No: D9-22-572-2006; Kuala Lumpur High Court) (Unreported) (**refd**)

Hong Leong Bank Bhd v. Chee Kok Weng; Next Car Sdn Bhd; Chee Kok Weng (Third & Fourth Party) [2012] 1 LNS 231 HC (**refd**)

Petroliam Nasional Bhd (Petronas) & Anor v. Cheah Kam Chiew [1986] 1 LNS 81 SC (**refd**)

Re Teoh Heng Han; Ex P OCBC Bank (M) Sdn Bhd [2010] 9 CLJ 328 HC (**refd**)

Yap Toon Choy v. Hong Leong Bank Berhad & Anor (Tunku Hammam Tunku Sulong (Third Party)) [2012] MLJU 288 (**refd**)

Legislation referred to:

Legal Profession Act 1976, s. 126(1)

Rules of Court 2012, O. 59 rr. 2(2), 16(1), (2), (3), (4), 23(1)

Rules of the High Court 1980, O. 59 rr. 27, 28

For the applicant - Paramjit Singh Pretam Singh; M/s Simon Hue & Assocs

For the respondent - Lim Kien Huat; M/s Lee & Lim

Reported by Kumitha Abd Majid

JUDGMENT**Hamid Sultan Abu Backer J:**

[1] This is my judgment in respect of the bank's application to review the getting-up fees of RM100,000 made by the learned Senior Assistant Registrar for bill of costs on solicitor-client costs pursuant to an order of court made under s. 126(1) of the Legal Profession Act 1976, and reliance was made on the Rules of the High Court 1980. And for the purpose of this judgment I will refer to the Rules of Court 2012 (RC 2012) to explain the general principles relating to assessment of costs and in particular, getting-up fees.

[2] In the instant case, the defendant (now known as Hong Leong Bank Bhd) (bank) was represented by Messrs Lee & Lim advocates and solicitors to defend the suit filed by the plaintiff in the High Court. The plaintiff succeeded and subsequently Messrs

A Lee & Lim was discharged as solicitors for the defendant. The defendant appealed on the decision through the present solicitors for the defendant, Messrs Simon Hue & Associates. The appeal was allowed and the Court of Appeal ordered costs of only RM5,000 for both the Court of Appeal and the High Court.

B [3] Messrs Lee & Lim sent a bill to the bank to claim solicitors fees for the sum of RM42,350. The said bill reads as follows:

C Hong Leong Bank Bhd
PSF Credit Control centre-Mortgage NPL
Level 14 Wisma MPL
Jalan Raja Chulan
50200 Kuala Lumpur

Attn: En Zahani/ En Ezam

D Dears Sirs
Kuala Lumpur High Court
Suit No: D3-22-231-01
Alex Ting Kuang Kuo v. Credit Corporation (M) Sdn Bhd

E We refer to the above which was fixed for Decision on 28/2/08 where Plaintiff's claim against the Defendant was allowed with costs on the ground that the Defendant had breached the terms of the loan agreement for making payment to the Developer without authorization from the Plaintiff.

F Our charges are as follows:

Prof Fees	RM	RM
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G In respect of the above; taking your instruction; perusing the Writ of Summons and Statement of Claim served on you by Plaintiff's solicitor on 16/3/01; preparing and filing Memorandum of Appearance on 20/3/01; preparing and filing Defence and serving on Plaintiff's solicitors; perusing the Plaintiff's Summons for Direction under Order 25 and advising you the same; obtained order on 24/5/01 to file and affidavit verifying the list of documents; perusing; filing and served your "Affidavit Menentusahkan senarai Dokumen" affirmed by your attorney Mr Foo Far Fong and list of documents; perusing Plaintiff's "Pernyataan Fakta-Fakta yang dipersetujui; Summary of Issues to be tried and "Senarai Dokumen yang dipersetujui"; preparing and filing all the necessary documents by 21/1/02; preparing, filing and extracting Summons in Chamber dated 19/5/06 under Order 18

I Rules of High Court; preparing and filing your witness statement

and summary of case on 2/7/07; write the letter to the Developer for their consent to auction on 3/7/07; preparing, filing and serving your written submission, Bundle of Authorities, skeletal facts, your witness statement on 1/11/07; perusing and attending to numerous letter; effecting services; numerous attendance in court on 20/3/01, 11/5/01, 24/5/01, 21/9/01, 21/2/02, 25/3/02, 23/4/02, 30/5/02, 13/7/02, 14/9/05, 20/10/05, 13/1/06, 2/4/06, 19/5/06, 7/8/06, 29/8/06, 8/12/06, 26/3/07, 27/6/07, 9/7/07, 10/7/07, 11/7/07, 13/11/07 and 28/2/08 and attending to all matters related thereto and not specifically mentioned herein

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	40,000.00	
Tax	<u>2,000.00</u>	<u>42,000.00</u>

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Filing memorandum of Appearance, written submission, Bundle of Documents, list of Documents, Summons in Chamber,

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Affidavits and etc	100.00
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Process server	200.00
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Travelling to court & relevant places & parking thereat	600.00
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Postage, copying & printing charges	300.00
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Telephone, fax & other misc expenses	<u>150.00</u>
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1,350.00

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Paid initial disbursement on 24/4/01	(1,000.00)
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Total	<u>42,350.00</u>
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Thank you

Yours faithfully

[4] The bank was not happy with the quantum claimed and in consequence, filed a petition under the Legal Profession Act 1976 for Messrs Lee & Lim to tax their bill. Based on the order of court, Messrs Lee & Lim filed the bill of costs and the Senior Assistant Registrar allowed RM35,000 for getting-up fees. Messrs Lee & Lim was not satisfied and filed a review and the Senior Assistant Registrar revised her decision and allowed getting-up fees in the sum of RM100,000. This application is before me by the bank complaining that the revised sum for getting-up ordered is excessive.

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A [5] After having read the preliminary submission of the parties,
I was not satisfied as the parties have not dealt with the
methodology to ascertain solicitor-client costs. What is obvious
from the taxing registrar's certificate dated 8 June 2012 is that the
learned Senior Assistant Registrar has plucked a figure for getting-
B up fees without setting out the methodology in deriving the said
sum.

[6] The brief facts of the case are well articulated by the
applicant. Much judicial time will be saved if they are reproduced.
C The said submission in encl. 49, *inter alia*, reads as follows:

1.1 Nature of the claim for the above case

1.1.1 In this case the Plaintiff's original claim against HLBB
(as the Defendant and formerly Credit Corporation (M)
Berhad) is that the Defendant has breached the terms of
D a Loan Agreement to make a payment of RM73,250.00
to the Developer without the consent of the Plaintiff.
Hence the Plaintiff claimed for a declaration that:

(i) the Assignment between the Plaintiff and the Bank be
E terminated;

(ii) there is no money owed by the Plaintiff to the Bank;

(iii) the Bank shall take all measures to vest the beneficial
and legal rights of a property to the Plaintiff.

F 1.1.2 Pursuant to a sale & purchase agreement dated
29.5.1984 ("S&P"), the Plaintiff purchased the property
from the Developer for a sum of RM367,500.00. The
Plaintiff then obtained financing from the Defendant for a
sum of RM257,000.00.

G However, on 20.11.1986, when the Developer sought for
the progress payment of RM73,250.00 from the
Defendant, the Plaintiff ordered the Defendant (by telex)
to stop the payment because he had a dispute with the
Developer.
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1.1.3 Despite the above, the Defendant released the progress
payment of RM73,250.00 payment pursuant to. Clause
1.2 of the Loan Agreement which states as follows:

I Notwithstanding that there is a dispute between the
Borrower(s) and the Vendor for the purpose of this
clause the Borrower(s) hereby give (s) her/her/their

express consent to the Lender to release the Housing Loan to the Vendor in the manner and at the times specified in the Sale Agreement.

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- 1.1.4 At the trial both parties had (1) one witness each as mentioned at page 527 of [Tab D] DBOA which states as follows:

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Decision

[39] At the trial, both parties had one witness each. The plaintiff himself was the sole witness for the plaintiff's case. The defendant's sole witness was Mr Ong Teck Hock a Branch Manager of the defendant.

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- 1.1.5 On 28.2.2008, the High Court allowed Plaintiff's claim as mentioned at page 532 & 533 of [Tab D] DBOA with cost (no specific sum was awarded by the High Court). As a result, HLBB filed an appeal in the Court of Appeal on 19.3.2008.

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- 1.1.6 On 5.1.2011, the Court of Appeal allowed HLBB's appeal by overturning the High Court's decision abovementioned and awarded cost of RM5,000.00 only for both the Court of Appeal level and the High Court level.

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- 1.2 What should be the "party to party cost" for the case in the High Court.

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- 1.2.1 In this case the dispute arose due to the release of the progress payment of RM73,250.00. Further, there is no counter claim filed by HLBB. Hence, we respectfully submit that the subject matter is only RM73,250.00

- 1.2.2 We like to refer this Honourable Court to the Article written by Dato' Kamalanathan Ratnam titled "Taxation of Costs" - [Tab A (i)] DABOA whereby at page 7 of the same he referred to the case of *Canopee Investment Pte Ltd & Ors v. Landmarks Holdings Bhd & Ors* [1990] 1 CLJ 466 which states as follows:

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A starting point in considering the exercise of discretion by a taxing officer particularly in respect of the item of 'getting-up' could be the fixed scale of costs set out in O. 48 r. 12 of the Subordinate Courts Rules 1980. The fixed cost in the scale is in proportion to the quantum of the subject matter of the action ... Now, for purposes of taxation of costs running down actions could be considered to be the simplest of cases. It should attract for getting-up about the amount arrived at by applying the Subordinate Courts Rules 1980 scale. (emphasis added)

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- A 1.2.3 Therefore, due to the case above and pursuant to the scale cost in Order 48 r 12 Rules of the Subordinate Court 1980 - [Tab B(i)] DABOA, the defending cost & suing cost for the sum of RM73,250.00 adds up to RM5,575.00 only!!! (ie RM1,125.00 and 4,450.00).
- B 1.2.4 However, in the alternative if this Honourable Court is of the view that the subject matter is the loan sum of RM257,000.00 provided to the Plaintiff by the Defendant, then, the defending cost & suing cost for the sum of RM257,000.00 adds up to RM18,350.00 only!!!.
- C 1.2.5 However, the above principles in *Canopee's* case were qualified by the learned judge in *JP Finance (M) Bhd v. Tanswan Brothers Enterprise Sdn Bhd & Ors* (1994) 1 MLJ 47 at page 8 of Dato' Kamalanathan Ratnam's article "*Taxation of Costs*" which states as follows:
- D The first is that there should be a significant tapering of the rate by which the costs are increased as the value of the subject matter of the claim gets higher. It is, of course, not for me to prescribe or lay down the rates at which the increase is to be computed. The rate would vary from case to case. At the low end would be the running down and simple goods sold and delivered type of cases and at the other end the not run of the mill and/or complicated cases ...
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- F Page 9 - Dato' Kamalanathan Ratnam's article "*Taxation of Costs*"
- G For my part, whilst I agree that the scale of the SCR is a starting point to registrars, it is by no means binding. As was remarked by the learned judge in *JP Finance* his views are not to bind the registrar who has absolute discretion. Likewise in *Property and Revisionary Investment Corp Ltd v. Secretary of State for the Environment* [1975] 2 All ER 436, the learned Judge was of the view that having regard to the differing circumstances which may apply to each case, is probably difficult for the Law Society or in Malaysia, the Rule Committee, to give any firm guidance to the profession. At p. 441, the learned judge held as follows:
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- I It is an exercise in assessment, an exercise in balanced judgement - not an arithmetical calculation. It follows that different people may reach different conclusions as to what sum is fair and reasonable, although all should fall within a bracket which, in the vast majority of cases, will be narrow.

1.2.6 We respectfully submit that the increase of RM100,000.00 awarded by the Registrar is due to wrongful exercise of her discretion.

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1.3 What is the methodology used to determine solicitors client's cost when there is no agreement as to fees.

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1.3.1 As your lordship is aware that Solicitors client's cost is pursuant of Order 59 r. 28 RHC 1980. The same is also elaborated in the Article written by Pretam Singh Darshan Singh titled "Effective Ways To Persuade In Taxation Proceedings" - [Tab C(i)] DABOA

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1.3.2 Pursuant to the Article highlighted by this Honourable Court by "Turnbull Bowles Lawyers" [Tab D(i)] the article suggest that for a party to party cost will likely be in the range of 40-60% of the actual legal cost incurred by one side and solicitor/client cost will be in the order of 50-80% of the actual legal cost incurred.

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1.3.3 However, pursuant to Pretam Singh Darshan Singh's Article at page 5 states that in practice it is observed that party to party cost is about 1/3 of solicitors and clients costs.

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1.3.4 Therefore, we respectfully submit that since the Court of Appeal only granted cost of RM5,00.00 for Court of Appeal level & also High Court level therefore, Messrs Lee & Lim solicitors clients bill of cost should be RM15,000.00 ONLY!!!. The fact that the Registrar awarded RM35,000.00 at the first instance is rather generous.

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[7] Before deciding what the getting-up fees for solicitor-client costs should be, it is important and necessary and also good practice to ascertain what the getting-up fees should be if they are on a party to party basis (see standard basis O. 59 r. 16(3) of the RC 2012). It is trite that party to party costs are costs which the court orders another party to the litigation to pay. Under the RC 2012, it is assessed on standard basis similar to the UK under their new provisions. The RC 2012 may provide for scale costs in such matter. The scale costs for subordinate courts are much precise and adequately dealt with. Even if there are scale costs for the subordinate court or High Court, the discretion to award costs and the quantum of the award is entirely left to the

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- A discretion of the court (see O. 59 r. 2(2) of the RC 2012). The discretion of the court is very wide but it has to be exercised judiciously on an established principle. For example, O. 59 r. 23 of the RC 2012 sets out the scale of costs for trial in the subordinate courts. The scale costs do not necessarily mean that
- B the magistrate or registrar or sessions judge is restricted from making any other suitable orders according to the justice of the case, inclusive of no order as to costs or lesser sum than the scale costs. This is specifically set out in O. 59 r. 23(1) of the RC 2012 which states as follows:
- C Subject to the provisions hereunder, upon the conclusion and determination of any trial in the Subordinate Courts, the party entitled to costs shall, unless the Court otherwise orders, be paid fixed costs in accordance with the following scale.
- D **[8]** Order 59 r. 16(1) of the RC 2012 gives some guidelines as to what relevant circumstances the court must take into consideration when assessing costs. It reads as follows:
- E In assessing the costs payable in relation to any item, the Court shall have regard to all relevant circumstances, and in particular to:
- F (a) the complexity of the item or of the cause or matter in which it arises and the difficulty or novelty of the questions involved;
- G (b) the skill, specialized knowledge and responsibility required of, and the time and labour expended by, the solicitor or counsel;
- (c) the number and importance of the documents, however brief, prepared or perused;
- (d) the place and circumstances in which the business involved is transacted;
- (e) the importance of the cause or matter to the client;
- H (f) where money or property is involved, its amount or value;
- I (g) any other fees and allowances payable to the solicitor or counsel in respect of other items in the same cause or matter, but only where work done in relation to those items has reduced the work which would otherwise have been necessary in relation to the item in question.

In addition, it must not be forgotten that the court may look into other factors such as the conduct of parties (before as well as during the proceedings) and efforts made to resolve the dispute etc. to order no costs or reduce costs or order party to party costs on indemnity basis ie, sometimes referred to as solicitor-client costs. This is specifically set out in O. 59 r. 16(2) which states as follows:

Subject to the other provisions of these Rules, the amount of costs which any party are entitled to recover is the amount allowed after determination of costs on the standard basis where:

- (a) an order is made that the costs of one party to proceedings be paid by another party to those proceedings;
- (b) an order is made for the payment of costs out of any fund; or
- (c) no order for costs is required, unless it appears to the Court to be appropriate to order costs to be determined on the indemnity basis.

(see *Petroliam Nasional Bhd (Petronas) & Anor v. Cheah Kam Chiew* [1986] 1 LNS 81 SC)

[9] Party to party costs, in essence, are those costs which are necessarily incurred and RC 2012 says it as 'standard basis'. Order 59 r. 16(3) elaborates it as follows:

On an assessment of costs on the standard basis, there shall be allowed a reasonable amount in respect of all costs reasonably incurred and any doubts which the Court may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party; and in these Rules, the term "the standard basis", in relation to the determination of costs, shall be construed accordingly.

[10] As a general rule, court is obliged to order party to party costs on a standard basis and is given the discretion to order the same on indemnity basis (see O. 59 r. 16(2) of the RC 2012). A party to party costs on indemnity basis may be ordered where there has been scandalous conduct and is meant to be punitive in nature (see *EMI Records v. Wallace* [1982] 2 All ER 980). Order 59 r. 16(4) of the RC 2012 sets out the manner costs on indemnity basis should be assessed. It reads as follows:

On a determination of costs on the indemnity basis, all costs shall be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred and any doubts which the

- A Court may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party; and in these Rules, the term “the indemnity basis”, in relation to the determination of costs, shall be construed accordingly.
- B [11] Solicitor-client costs, in essence, are based on indemnity basis. The solicitor-client costs are not based on what costs or fees the solicitor has agreed with the client. If the solicitor has agreed with the client a certain fees (actual costs), they are contractual and have nothing to do with taxation on solicitor-client basis. Taxing registrar must note this distinction. For example, contract may provide that the costs of litigation between the parties will be based on solicitor-client costs. This just means it must be taxed on indemnity basis and not on what the solicitor has agreed with the fees for his clients. For example, where it is related to default judgment, the getting-up fees will only be nominal and not what the solicitor has agreed with the clients. Even if there is a contract between the parties to assess costs on solicitor-client basis, the ultimate discretion of costs is still vested in court pursuant to the Courts of Judicature Act 1964 and as well as the RC 2012 to award appropriate amount.
- E [12] In the instant case, there is no agreement as to fees save that the solicitor has sent a bill to client for the sum of RM42,350. The learned Senior Assistant Registrar, upon her review, has awarded a sum of RM100,000, more than what the solicitor claimed for in the bill to the client, and the registrar’s certificate where the grounds are stated, do not set out the legal basis how the figure was derived. The bank complains that it is a defective award and is founded on error of law. Messrs Lee & Lim argues that judge’s jurisdiction on review is one of review and not rehearing and in the harshest term, says the judge has no jurisdiction to interfere unless it can be demonstrated that the taxing registrar has erred on a question of principle, when it is quite clear and obvious that the learned Senior Assistant Registrar has not applied any principles of assessment in ascertaining the getting-up fees when deriving the award.
- H [13] I have read the application, affidavits and submission of the parties in detail. Both learned counsel have filed a comprehensive submission. The court is grateful. It will serve no useful purpose
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to repeat the submission save to deal with the core issues. After having given much consideration to the submission of the respondent, I take the view that this is a fit and proper case to fix the getting-up fees upon review to RM35,000. My reasons, *inter alia*, are as follows:

(a) Under the Rules of the High Court 1980, taxation of costs on party to party basis was dealt with in O. 59 r. 27 and solicitors and own client basis was dealt with in O. 59 r. 28. Similar provisions for assessment are provided for in O. 59 r. 16(3) and 16(4) of the RC 2012 respectively. What these orders do not mention is the methodology for deriving at the getting-up fees. Deriving at the getting-up fees is a challenging task for taxing registrar in almost all jurisdiction and it is best to be dealt with by the judge who hears the matter and this is what precisely the RC 2012 has mandated in contrast to other jurisdiction to arrest the cumbersome process of taxation and review.

(b) It is trite that party to party costs will be less than solicitor-client costs in respect of getting-up fees. The position in the UK or in other common law jurisdiction appears to be the same. The learned counsel for the appellant to drive home this point on the percentage difference between the party to party costs and solicitor-client costs in respect of getting-up fees relies on a note on the internet from *Turnbull Bowles Lawyers* which read as follows:

Legal Costs in Litigation - party/party and solicitor/client

We are often asked the question by clients, 'what is the difference between party/party and solicitor/client costs?'.

This often arises during initial conferences and then again during settlement discussions. The first point to understand is that a costs order will almost never actually pay the out of pocket legal expenses incurred in litigation. This is due, perhaps, in part to a public policy position that parties to litigation should not be encouraged to engage in litigation by transferring all risk in the proceedings to the losing party.

When considering the difference between party/party and solicitor/client (or indemnity) costs, Malins VC in *Smith v. Buller* [1875] 19 Eq, at p. 475 said it well:

- A costs chargeable ... between party and party are all that are necessary to enable the adverse party to conduct the litigation and no more. Any charges merely for conducting the litigation more conveniently ... must be paid by the party incurring them.
- B Despite the age of the decision, the principle holds true. Party/party are those costs which are 'necessarily' incurred, while solicitor/client costs are those costs 'reasonably' incurred (which includes those costs 'necessarily' incurred.
- C Orders for judgment often state 'Defendant to pay the Plaintiff's costs as agreed or assessed' and it is very common to have costs agreed rather than assessed. The costs assessment process can be lengthy and expensive and subject to appeals. Commercially it is quite beneficial to agree on a figure for costs and settle the matter completely.
- D But how can a party agree on what a party/party cost is versus a solicitor/client cost? One very quick approximation is that party/party costs will likely be in the range of 40-60% of the actual legal costs incurred by one side, and solicitor/client costs will be in the order of 50-80% of the actual legal costs incurred. The precise sum will vary depending on how a case is managed, including the level of service a client seeks.
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- F From the above note, as a general rule, it can be said that solicitor-client costs cannot exceed double the party to party costs, and the actual legal costs will only arise if there is an agreement as to fees between solicitors and client. If there is no such agreement then the solicitor will have to eat the 'humble pie' the court decides which will be based on the appropriate solicitor-client costs and not the actual legal costs
- G the solicitor could have claimed.
- (c) Articles which discuss solicitor-client costs as a barometer relies on party to party costs to ascertain solicitor-client costs. To ascertain party to party costs where applicable, one may rely on the scale costs for the subordinate court as was done in the case of *Canopee Investment Pte Ltd & Ors v. Landmarks Holdings Bhd & Ors* [1990] 1 CLJ 466; [1990] 1 CLJ (Rep) 699. Where the nature of the claim cannot be quantified or is not truly relevant to the subordinate court scale such as winding-up petition etc, then one has to rely on cases which have awarded party to party costs.
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- (d) In the instant case, the learned counsel for the respondent argues as follows: A

My Lord, it is trite law that on review, unless it can be demonstrated that the taxing registrar had erred on a question of principle, the court would have no jurisdiction to interfere. See *United Malayan Banking Corporation v. Syarikat Perumahan Luas Sdn Bhd* [1991] 3 MLJ 181. B

My Lord, the principle for taxation for this matter is as follows:

(a) Taxation is on the basis of solicitors and client as oppose to party and party. This is provided under Order 59 Rule 17 Rules of Court 2012; and C

(b) Order 59 Rule 28 Rules of High Court 1980 which is in *pari material* with that under the new Rules of Court 2012 under Order 59 Rule 16. D

My Lord, the taxing registrar has issued its certificate dated 18.6.2012 laying down the ground of her award ("RC"). From the RC, it can be seen clearly that the taxing registrar has addressed both item (a) and (b) hereinabove. As such, there is no error on a question of principle. E

My Lord, this matter involve a property with a value of RM367,500.00 as at 29.5.1984 and a loan sum of RM257,000.00 as at 18.2.1985, both of which would have increased over time. The issue between the Plaintiff and the Defendant arose from the Plaintiff's instruction to the Defendant not to pay the sum of RM73,250.00 to the developer of the Property, which the Defendant did not follow. F

My Lord, thereafter the Defendant recalled the housing facilities provided to the Plaintiff and claim for the return of RM173,994.64 as at 30.3.1998. In retaliation, the Plaintiff sued the Defendant in the year 2001 for *inter alia*: G

(i) termination of the assignment of the Property from the Plaintiff to the Defendant; H

(ii) that there is no monies owing from the Plaintiff to the Defendant; and

(iii) that the Defendant vest all legal and beneficial title of the Property to the Plaintiff. I

- A My Lord, there are four (4) issues at the full trial of this matter. This can be seen clearly in the decision of the presiding judge at page 12 of our Ikatan Dokumen attached to our Written Skeleton Submission dated 21.9.2012. The trial took four (4) days with two (2) witnesses.
- B My Lord, we as solicitors for the Defendant for the trial at High Court has obviously done a lot of work on this matter to the extent that the presiding judge has to deliver a reported decision of 22 pages. See pages 1 - 22 of our Ikatan Dokumen attached to our Written Skeleton Submission dated 21.9.2012.
- C The action was filed in the year 2001 and was finally disposed of by the High Court only in 2008. We were appointed by the Defendant to defend the Defendant which would require greater effort as oppose to acting in the capacity to sue. The Plaintiff was represented by Messrs Skrine & Co., the largest and a reputable firm of solicitors in Malaysia.
- D My Lord, the Defendant specifically appointed our counsel, Mr Lim Kien Huat to handle this matter as our Mr Lim is previously a banker. At the material time of the trial, our Mr Lim is a senior member of the Bar. Our Mr Lim has vast experience in matter of banking including providing training for financial institution and has also acted for Minister. See press report attach herein.
- E My Lord, the trial involves voluminous and important documents and, amongst others, sale and purchase agreement, loan agreement, deed of assignment and power of attorney. These documents are especially important for the Defendant as it is with these documents the Defendant's makes its earning as a banker. So to speak, these documents are the tools of the Defendant.
- F My Lord, the importance of this case to the Defendant cannot be denied. It involves the earning, trade and practices of the Defendant. It is not only important to the Defendant but also other banking and financial institution in Malaysia.
- G My Lord, under Order 59 Rule 17 Rules of Court 2012 - costs payable to a solicitor by his own client - all costs shall be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred. See Order 59 rule 17(2).
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Under Order 59 rule 17(3), all costs incurred with the express or implied approval of the client shall be conclusively presumed to have been reasonably incurred and, where the amount thereof has been expressly or impliedly approved by the client, to have been reasonable amount.

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Thus, My Lord, the duty or burden is on the Defendant to rebut this presumption. There is nothing offered by the Defendant to rebut this presumption. See *Templer Park Golf & Resort Bhd & Anor v. Tetuan George Varughese* [2010] 8 CLJ 754.

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The decision at the Court of Appeal has no bearing on the taxation of the High Court level. In fact, the decision of the Court of Appeal is not even a consideration under part of Order 59 Rule 28 Rules of High Court 1980 or the new Rules of Court 2012 under Order 59 Rule 16. Thus, it ought not to be taken into account. In any event, the cost on appeal is on party to party basis as oppose to solicitors and client basis and it is trite law that the cost at an appeal stage would be lesser than at the original stage or court of first instances.

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My Lord, we submit that there is no error on a question of principle by the taxing registrar and as such, the award of the taxing registrar ought to be maintained. See *Lembaga Pembangunan dan Lindungan Tanah (Land Custody and Development Authority) v. Crystal Realty Sdn Bhd & Anor* [2011] 1 CLJ 917.

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- (e) In my view, the claim is straight forward and the issues of law are well-settled and in consequence, the Court of Appeal taking into consideration the factual matrix of the case, ordered only RM5,000 for appeal as well as trial in the High Court. In that respect, I reject the submission of the respondent which attempts to adumbrate it as complex etc. However, that does not mean all things being equal the party to party costs in respect of such matter that too in the High Court will only amount to RM5,000 or less. For the purpose of taxation, the consideration must be based on all things being equal what should be the party to party costs and not the circumstances which will result in the reduction of costs or order where no costs is allowed. In this respect, I accept the submission of the learned counsel for the applicant that

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- A the party to party costs should not exceed RM18,350 (and the getting-up fees must be much less as other items taxed must be deducted). Such an award is consistent with a number of cases where the defendant has succeeded in more complex matter and issues relating to higher quantum of claim.
- B The costs range was between RM15,000 and RM30,000 (see *Hong Leong Bank Bhd v. Chee Kok Weng (Next Car Sdn Bhd (Third Party) & Chee Kok Weng (Fourth Party))* [2012] MLJU 289; (ii) *Yap Toon Choy v. Hong Leong Bank Berhad & Anor (Tunku Hammam Tunku Sulong (Third Party))* [2012] MLJU 288; and (iii) *Goh Heng Loo v. Gensource Berhad & Hong Leong Bank Berhad* (yet to be reported; Suit No: D9-22-572-2006; Kuala Lumpur High Court; dated 8 October 2012).
- D (f) Having ascertained the approximate party to party costs relating to the getting-up fees, I take the view that the getting-up fees in the instant case should not exceed RM35,000. In fact, I must say that the getting-up fees of RM35,000 awarded by the learned Senior Assistant Registrar in the first instance is excessive. I take the view that the High Court judge should be slow in disturbing the same even though the decision of the registrar can be set-aside by the judge and in appropriate cases even if there is no appeal or review (see *Re Teoh Heng Han; Ex P OCBC Bank (M) Sdn Bhd* [2010] 9 CLJ 328) but such cases will be extremely rare (see *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75).
- G (g) *En passant*, I must say it is unfortunate in the instant case the solicitors have not secured a retainer for agreed fees or given appropriate disclosure as to fees. In some jurisdiction, there is mandatory imposition by statute to provide disclosure as to the estimated costs from the time of the appointment and throughout the costs of retainer to avoid or minimise dispute. I do not see why our legal profession should not be mandated with such obligation for the benefit of solicitors as well as clients to ensure harmonious relationship as well as to arrest taxation of solicitor-client costs in the courts between solicitor and client which in actual fact is a strain on Malaysian taxpayers.

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[14] For reasons stated above (except the last paragraph), the getting-up fees is fixed to RM35,000. The respondent to pay the costs of review in the sum of RM3,000 to the applicant/bank. The applicant to pay allocatur before the extraction of order for costs, and the deputy registrar to issue certificate for the allocatur.

[15] I hereby order so.

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